United States
Circuit Court of Appeals
For the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiff in Error,
v.
PRESTON ROYER,
Defendant in Error.
No. 3203

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiff in Error,
v.
W. J. WASSON and MABEL WASSON,
Defendants in Error.
No. 3204

Brief of Plaintiff in Error

A. C. SPENCER and
C. E. COCHRAN,
Attorneys for Plaintiffs in Error,
Portland, Oregon.

JAMES E. FENTON,
Of Counsel,
San Francisco, California.

KUBLI-HOWELL CO., PORTLAND, ORE.

United States
Circuit Court of Appeals
For the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiff in Error,
v.
PRESTON ROYER,
Defendant in Error.
No. 3203

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiff in Error,
v.
W. J. WASSON and MABEL WASSON,
Defendants in Error.
No. 3204

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Southern Division.

STATEMENT OF THE CASE.

These actions were commenced in the month of October, 1917, by the defendants in error (who will be referred to herein as the plaintiffs) against the plaintiff

in error (who will be referred to herein as the defendant) to recover damages from defendant for injuries to the real property of the plaintiff Wasson, and to the real and personal property of plaintiff Royer, resulting, as it is alleged, from an overflow of the lands of plaintiffs caused, as it is alleged, by the construction of an embankment by defendant on its right of way over and across an alleged water course known as Spring Creek; and by placing in the alleged bed or channel of said alleged creek a pipe or drain which, it is alleged, was insufficient to carry off the waters that flowed down through said alleged creek at certain seasons of the year. (Trans. Royer case, pp. 4-6.)

"Spring Creek is dry in the aggregate over eleven months in the year, and sometimes it does not run that month. There must be snow in the hills to put water in that channel, by the Chinook winds. The waters coming down Spring Creek is caused by the melting snow." (Testimony plaintiff Royer, Trans. Wasson case, pp. 22 and 28.)

"Spring Creek carries water only during the spring freshets; the only time the waters run there was when the snow would come on the Rattle Snake Hills and would melt and go off suddenly." (Testimony Mason, a witness for plaintiffs, Trans. Wasson case, p. 24.)

Between the 20th of January and the 10th of February in the year 1916, there were two heavy snows, one twelve to fourteen inches and the other twelve to sixteen inches in depth, in the Rattlesnake Hills, extending, gradually diminished in quantity, down to within five or six miles of the level land. There was no snow on the level land. The chinook winds started about

January 20th, melting this snow and causing an extraordinary and unexpected flood of surface waters to run in a southerly direction across the right of way of defendant; "it destroyed the roadbed at a great distance, broke through a stretch of railroad track, went over the ties, and washed a deep hole through the railroad" on to the lands of plaintiffs. (Testimony of plaintiff Royer, Trans. his case, p. 27.)

At the time of the alleged injury to the property of plaintiffs, the line of railroad of defendant ran in a westerly direction between the City of Walla Walla, Washington, and the City of North Yakima, Yakima County, Washington, and ran through Benton County, Washington, over and across a part of the land of plaintiff Wasson and north of, but near the land of plaintiff Royer.

A ravine or hollow which the plaintiffs denominate "a channel" originates in the Rattlesnake Hills in Benton County, Washington, about fifteen miles northwest of the lands of plaintiffs, and runs in a southeasterly direction towards the railroad line of defendant, spreading out into a flat some distance northerly from said railway line. (Trans. Royer case, pages 2-3 and 22.)

"The annual snowfall in the hills north of the railroad right of way varies from nothing to as high as eighteen inches." (Testimony of Heiberling, a witness for plaintiffs, Trans. Royer case, pages 22-23.)

"Spring Creek is dry in the aggregate over eleven months in the year." "The waters coming down Spring Creek is caused by the chinook winds melting the snow."

(Testimony of plaintiff Royer, Trans. his case, pp. 24 and 30.)

The defendant constructed the embankment and drain referred to in the year 1910. The drain or culvert referred to, is circular in form, and 48 inches in diameter. Before this drain or culvert was placed in the alleged channel of Spring Creek, the engineer of defendant made inquiry from residents in and about the neighborhood as to the flowage of water, and also made an independent investigation of the climatic conditions and topography of the country, and from the information obtained, it was his opinion that a drain 48 inches in diameter was sufficient in size to carry off the normal flow of surface water that came down this alleged creek. (Trans. Royer case, pp. 41 and 43.)

The cases were tried to the Court and a jury and resulted in a verdict and judgment in favor of the plaintiff Royer in the sum of $850.00, and a verdict and judgment in favor of the plaintiff Wasson in the sum of $1000. Writs of Error were sued out for the reversal of these judgments. (Trans. Royer case, pp. 18-19.) (Trans. Wasson case, pp. 16-17.)

The questions for determination upon the Writs of Error herein are:

First: Are the rights of the respective parties to these actions to be determined by the common law relating to natural watercourses, or relating solely to surface water?

Second: If such rights are to be determined by the common law, then do the complainants herein state facts sufficient to constitute causes of action against defendant?

Third: Was the evidence herein sufficient to show: (a) that Spring Creek is a natural watercourse; or (b) that any natural watercourse was obstructed by defendant; or (c) that the flowage of water on the lands of plaintiffs was caused by any negligence of defendant?

Fourth: Was the evidence sufficient to entitle the plaintiffs to recover?

CONTENTIONS OF DEFENDANT.

The defendant contends:

(a) That the rights of the respective parties to these actions are to be determined by the rule of the common law relating to surface waters.

(b) That the complaints herein do not state facts sufficient to constitute causes of action.

(c) That Spring Creek is not a natural watercourse.

(d) That there were no natural watercourses obstructed by the defendant.

(e) That the waters which flowed upon the lands of plaintiffs were surface waters only.

(f) That the flowage of water on the lands of plaintiffs was not caused by any negligence of defendant.

(g) That plaintiffs with full knowledge of the manner of construction of said embankment and drain, and of their rights in the premises, acquiesced in the maintenance thereof.

(h) That the injury, if any, to the property of plaintiffs was the result solely of an extraordinary

and unexpected flood, and the damage, if any sustained, was *damnum abseque injuria.*

(i) That the Court should have instructed the jury to find a verdict for defendant and against each of the plaintiffs.

(j) That the Court should not have instructed the jury as a matter of law, as it did in effect, that Spring Creek was a natural watercourse, but, on the contrary, should have instructed the jury that the so-called Spring Creek was nothing more than surface water, resulting from melting snow flowing in a hollow or ravine.

The defendant upon its Writs of Error has made the following Assignments of Error:

ASSIGNMENTS OF ERROR.

I.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

> Gentlemen of the Jury, under the view the Court takes of the law in this case, your verdict for instruct you to that effect. (Trans. Royer case, p. 52, Wasson case, p. 50.)

II.

The Court erred in declining to give to the jury the following instruction requested by the defendant-plaintiff in error:

> I instruct you that defendant had a right to build its railroad embankment at the place and in the manner which the evidence shows the same to be built. (Trans. Royer case, p. 52, Wasson case, p. 50.)

III.

The Court erred in refusing to give to the jury the following instruction:

> I instruct you that under the evidence in this case the so-called channel of Spring Creek was nothing more than a drain for surface water resulting from melting snow in the drainage area above the lands in question and that other than from such melting snow the channel of Spring Creek carries no water and is dry for eleven months out of the year. This surface water is a common enemy against the flowage of which every land owner must defend himself, and I instruct you that the defendant in this case did nothing in respect to such surface water other than what it had a right to do in respect to its own property and in building its own railroad embankment. It had a right to place its embankment across Spring Creek drain, leaving whatever opening its engineers decided upon, and that under the circumstances shown by the evidence in this case, the defendant is not liable to either of the plaintiffs for the overflow complained of. (Trans. Royer case, p. 52, Wasson case, p. 51.)

IV.

The Court erred in refusing to give to the jury the following instruction requested by defendant-plaintiff in error:

> If you find from the evidence that any portion of the lands of Mr. Wasson and Mr. Royer was overflowed by water which passed through the defendant's culvert or which passed through the break of defendant's railroad west of the county road, then I instruct you that any flowage or damage arising by the presence of waters from that source

upon those lands, the defendant would not be liable. (Trans. Royer case, p. 53, Wasson case, p. 52.)

V.

The Court erred in giving to the jury the following instruction:

> The law of the case is plain and simple as I view it. Of course, the railroad company had a lawful right to construct its roadbed along its right of way, together with the right to make all necessary cuts and fills, but where such roadbed crossed a natural watercourse the company was bound to construct a culvert or make other adequate provision to permit the passage of the waters flowing down the stream at times of all ordinary freshets, but was not bound to anticipate or prrovide against unprecedented or unexpected floods. (Trans. Royer case p. 54, Wasson case p. 52.)

And also the following instruction:

> The first question for your consideration, therefore, is, did the company in the present instance make adequate provision for the free passage of all water which might ordinarily be expected to flow through the watercourse in question? If it did not, and such failure on its part was the direct and proximate cause of the injury to the property of the plaintiffs, real and personal, the plaintiffs are entitled to a verdict at your hands. (Trans. Royer case p. 54, Wasson case p. 53.)

VI.

The Court erred in entering judgment in favor of the defendant in error Royer and against the plaintiff in error for the sum of Eight hundred fifty ($850.00) Dollars, together with the costs and disbursements of

the action, and in not dismissing the complaint and in refusing and declining to enter judgment in favor of the plaintiff in error. (Trans. Royer case, p. 19.)

And also erred in entering judgment in favor of the defendant in error Wasson and against the plaintiff in error for the sum of One thousand dollars ($1000.00), together with the costs and disbursements of the action, and in not dismissing the complaint, and in refusing and declining to enter judgment in favor of the plaintiff in error. (Trans. Wasson case, p. 17.)

(Trans. of Record, Royer case, pp. 60-63.)
(Trans. of Record, Wasson case, p. 59.)

POINTS AND AUTHORITIES.

I.

"The Common Law, so far as it is not inconsistent with the constitution and laws of the United States or of the State of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."

Remington & Ballinger's Annotated Codes and Statutes of Washington, Section 143.

This provision of the laws of the State of Washington has been construed by the Supreme Court of that state in the following cases:

Sayward v. Carlson, 1 Wash. 29.
Eisenbach v. Hatfield, 2 Wash. 236.
Wagner v. Law, 3 Wash. 500.
Cass v. Dicks, 14 Wash. 75.
Benton v. Johncox, 17 Wash. 277.
Bates v. Drake, 28 Wash. 447.
Richards v. Redelsheimer, 36 Wash. 325.
Nesalhous v. Walker, 45 Wash. 621.

Corcoran v. Postal Telegraph-Cable Co., 80 Wash. 570.

The case of Eisenbach v. Hatfield (2 Wash. 236) was a suit in equity wherein the Court was called upon to determine the rights of Littoral Proprietors of lands abutting upon the shore of an arm of the sea in which the tide ebbed and flowed. In that case the Court, at page 240, said:

> "In this state the common law is our rule of decision in the settlement of questions requiring judicial determination, when not specially provided for by statute."

The case of Cass v. Dicks (14 Wash. 75) was a suit in equity to enjoin the building of a dike, and in that case the court, at page 77, said:

> "It must be borne in mind that the water, the flow of which will be obstructed by the dike, is not the currrent of a natural stream; and therefore the law determinative of the rights of riparian proprietors is not at all applicable to the case in hand. The water which passes from the premises of appellants does not flow in a defined channel having a bed and banks, and, consequently, is to all intents and purposes surface water, and the rights of the respective parties in regard thereto must be determined by the law relating solely to surface water; and, as to these rights, the decisions of the courts in the various states are far from uniform. The courts of some of the states have adopted the rule of the civil law, by virtue of which a lower estate is held subject to the easement or servitude of receiving the flow of surface water from the upper estate. Under that rule, it is clear that the flow of mere surface water from the premises of an upper proprietor to those of a lower may not be obstructed or diverted to the

damage of the latter. But the contrary rule of the common law has been adopted in many of the states, and must be followed in this case, because it is neither inconsistent with the constitution and laws of the United States nor of this state, nor incompatible with the institutions and conditions of society in this state. Code Proc., Sec. 108. By that law, surface water, caused by the falling of rain or the melting of snow, and that escaping from running streams and rivers, is regarded as an outlaw and a common enemy, against which anyone may defend himself, even though by so doing injury may result to others. The rule is based upon the principle that such water is a part of the land upon which it lies, or over which it temporarily flows, and that an owner of land has a right to the free and unrestrained use of it above, upon and beneath the surface. 24 Am. & Eng. Enc. Law, pp. 906, 917; Ang. Watercourses (7th ed.) Sec. 1080.

"If one in the lawful exercise of his right to control, manage, or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so; and if damage thereby results to another, it is *damnum absque injuria.*"

The case of Benton v. Johncox, 17 Wash. 281, was an action by a riparian proprietor to restrain certain of the appellants from diverting the waters of a stream and conducting the same to and upon their land for the purposes of irrigation. The Court, after discussing the facts, at page 280, said:

"But it is most earnestly insisted by the learned counsel for appellants that the common-law doc-

trine touching riparian rights is not applicable to the arid portions of the state, and especially to Yakima County; and this Court is now urged to so decide, notwithstanding anything it may heretofore have said to the contrary. The legislature of the territory of Washington in the year 1863 (Laws 1863, p. 68) enacted that 'the common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States and the organic act and laws of Washington territory, shall be the rule of decision in all the courts of this territory.' The language of this provision was changed by the state legislature in 1891 by omitting the words 'of England,' substituting the word 'state' for 'territory,' and inserting the clause, 'nor incompatible with the institutions and condition of society in this state.' Code Proc., Sec. 108. But the meaning remains substantially the same. It thus appears that the common law must be our 'rule of decision,' unless this case falls within the exceptions specified in the statute. Now, the common-law doctrine declaratory of riparian rights, as now generally understood by the Courts, is not, in our judgment, inconsistent with the constitution or laws of the United States or of this state. Nor is it incompatible with the condition of society in this state, unless it can be said that the right of an individual to use and enjoy his own property is incompatible with our condition—a proposition to which, we apprehend, no one would assent for a moment."

The case of Nesalhous v. Walker (45 Wash. 621), was a suit in equity, in which the plaintiff prayed for a decree adjudging him to be the first riparian owner of the waters of a certain stream, and enjoining the defendant from diverting the waters of the stream. The

opinion in this case was written by Judge Rudkin, who tried the instant case. After discussing the issues in that case, Judge Rudkin in his opinion, at page 623, said:

> "The Court below in its findings and conclusions, applied the doctrine of prior appropriation, and, if its ruling in that regard is correct, the decree should be affirmed, as the findings of the Court are sustained by the testimony. If, on the other hand, the rights of the parties are governed by the common-law doctrine of riparian rights, the decree is erroneous, and must be materially modified. The right to appropriate water for mining and agricultural purposes from watercourses on the public domain is sanctioned by acts of Congress, and recognized by all the Courts; but, when the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded in those states where the common-law doctrine of riparian rights prevails. The common-law rule was recognized and adopted by this Court after full consideration in the case of Benton v. Johncox, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912, and, whether best suited to local conditions or not, the decision established a rule of property that should not now be disturbed or departed from. In the case now under consideration, all parties concerned acquired or initiated their rights to their respective tracts before any attempt was made to acquire rights in the waters of the stream by appropriation. Therefore their rights in the stream, and the waters therein flowing, must be determined by the rule announced by this Court in the case cited. It was there declared that the common law doctrine of riparian rights is not inconsistent

with a reasonable use of the waters of the stream by riparian owners for the purposes of irrigation."

The case of Corcoran v. Postal Telegraph-Cable Co., 80 Wash. 570, was an action for damages for mental suffering claimed to have resulted to plaintiffs from the delay in the delivery of a telegram. The Court, in discussing the question as to whether or not there could be a recovery for mental suffering, at page 572, said:

"There is here presented the problem: Does mental suffering, independent of injury and financial loss, resulting from mere negligent delay in the transmission and delivery of a telegram, render the company, accepting such telegram for transmission and receiving pay therefor, liable in damages, measurable in money, to the sender and receiver whose mental suffering results from such negligent delay? Counsel for appellant contend that there is no such liability in this state, in view of the common law, which is in force here, in the absence of controlling statutory law. We have no statute in this state relating to damages of this nature. Since the beginning of civil government in the territory now occupied by our state, the common law has been the rule of decision in our Courts, except where other rules are prescribed by the Constitution or statutes. It has been so declared by legislative enactment. Section 143, Rem. & Bal. Code. Indeed, it would necessarily be so, even in the absence of legislative declaration, because of the source of our civilization and institutions. We have, it is true, adapted the common law and its reason to new conditions as they arose, and thereby occasionally worked what may be regarded as innovations

therein, when viewed superficially, but the spirit and reason of the common law have, as understood by our Courts, always been their source of guidance when statute and Constitution were silent touching the problem in hand."

It conclusively appears from the foregoing authorities that the rights of the parties to these actions were governed by the rule of the common law relating to surface waters.

II.

The plaintiff must frame his pleading with reference to some particullar theoretical right of recovery; and the pleading must be good on the theory upon which it proceeds, or it will not be sufficient on demurrer, even though it state facts enough to be good on some other theory. Nor can the plaintiff obtain relief upon a different theory from that upon which his pleading is based.

Bremmerman v. Jennings, 101 Ind. 253.
Holderman v. Miller, 102 Ind. 356.
Whitten v. Griswold, 60 Ore. 318.

The generral scope of the complaints in these cases plainly shows that they were drawn distinctly upon the theory that the injury, if any, to the property of the plaintiffs was caused solely by an extraordinary and unexpected flood of surface water, resulting from melting snow flowing in a hollow or ravine, and that it was not the intention of the pleader to state a cause of action for injuries to property resulting from the obstruction of a natural watercourse.

To this theory plaintiffs were bound through all the stages of the trial, and upon it they must stand or fall.

III.

The complaints in these actions do not, nor does either thereof state facts sufficient to constitute a cause of action.

The complaints and each thereof are insufficient for that:

(a) It appears upon the face of each thereof that the embankment and drain, whereby it is alleged the waters from Spring Creek were caused to flow on the lands of plaintiffs, were constructed by defendant company on its own right of way.

(b) It does not appear from the complaints or either thereof that Spring Creek is a natural watercourse.

(c) It does not appear from the complaints or either thereof that the natural flow of any watercourse was obstructed by defendant.

(d) It appears from each of the complaints that the water which flowed upon the lands of plaintiffs was surface water only.

(e) It does not appear from the complaints or either thereof, that the alleged flowage of water on the lands of the plaintiffs was caused by the negligence or tortious conduct of defendant.

(f) It appears from said complaints and each thereof, that the plaintiffs with full knowledge of the manner of construct ion of said embankment and drain and of their rights, acquiesced in the maintenance thereof.

Broom's Legal Maxims, p. 265.
Cooley on Torts, p. 187.
Churchill v. Baumann, 95 Cal. 541.
Southern Marble Co. v. Darnell, 94 Ga. 231.
Groff v. Ankenbrandt, 124 Ill. 51.

Lake Erie & Western R. R. Co. v. Hilfiker, 12 Ind. App. 280.
C. C. C. & St. L. R. Co. v. Huddleston, 21 Ind. App. 261.
Abbott v. K. C. St. J. & C. B. Ry. Co., 83 Mo. 271.
Collier v. C. & A. Ry. Co., 48 Mo. App. 398.
Koch v. Del. L. & W. R. R. Co., 54 N. J. Law, 401.
Wagner v. L. I. R. R. Co., 2 Hun. 633.
Rothschild v. Title Guaranty & Trust Co., 204 N. Y. 458.
Pa. Railroad Co. v. Washburn, 50 Fed. 335.
Post v. Beacon Vacuum Pump & Elec. Co., 89 Fed. 1.

The case of Collier v. The C. & A. Ry. Co., 48 Mo. App. 398, was an action to recover damages for the overflow of the plaintiff's lands caused by the backing up of surface water from the defendant's roadbed. The Court, in discussing the sufficiency of the complaint at page 401 said:

> "The plaintiff contends that the trial Court erred in sustaining the demurrer to the evidence adduced in support of the first count of the petition. There was not a *scintilla* of evidence tending in the remotest degree to show that the defendant was guilty of negligence in the construction of its roadbed; consequently, under the well-settled law of this state, the injury thereby done to the plaintiff's lands must be considered as the natural and necessary consequence of what the defendant had the right to do under its charter, and the damage was *damnum absque injuria*.

"There was no error in sustaining the defendant's demurrer. The defendant had the right to construct on its right of way, except where intersected by natural waterways, a solid and continuous roadbed for its track. No one had a right to have the surface water flow across its right of way, but on the contrary, it had a perfect right to prevent the water from doing so. If the declivity of the lands south of the defendant's road and west of that of the plaintiff, was towards the north, and in consequence thereof the surface water at any time on these lands occasioned either by rainfall or melting snows flowed north until it was obstructed by the defendant's roadbed, defendant was not required on that account to construct drains or ditches through its roadbed in order to allow such surface water to continue its onward course north. Such water was a common enemy against which the defendant had the right to protect itself.

The case of Koch v. Del. L. & W. R. R. Co. (54 N. J. Law 401), was also an action for damages for the overflow of plaintiff's land, and in that case the Court said:

"The plaintiff complains that the defendant, by certain tortious acts, has caused the waters of the Hackensack River to be discharged upon her meadow land.

"We think it is obvious that the first count demurred to does not state facts from which the Court can see that the plaintiff has the cause of action alleged. The allegations and statements are, that the meadow land in question, 'being thoroughly drained and dry,' the defendant made 'an opening through the causeway or roadbed of its railroad' and

thereby caused the 'tidewater from the Hackensack River' to be discharged upon the meadow lands aforesaid &c. It is impossible, from such a narration, for the Court to pronounce that a wrong in this matter has been committed by the railroad company. There is not even an averment in the count that, by reason of the natural situation or of any grant to that effect, the plaintiff has the right to require that the roadway of the defendant shall keep off this water from her land. In the natural condition of affairs, a landowner has the right to remove, either in whole or in part, any structure that he has erected upon his property, although such removal will prove detrimental to the possessions of others. The cutting complained of does not appear to be an actionable wrong.

"The fourth count we regard as also insufficient, on the same ground.

"The second and third counts are somewhat variant from the two just disposed of. They, each, in substance, aver, that the meadow land in question had been dry and drained for a number of years, and that the defendant kept and maintained a ditch alongside its roadbed, and thereby caused the water of the Hackensack River aforesaid to be discharged through said ditch last aforesaid, and through an opening through said causeway or roadbed upon the said meadow lands, etc.

"These counts, we think, are also essentially defective. Neither of them shows, with such reasonable certainty as the laws of pleading require, that, by doing the act stated, the defendant has committed a tort. The radical defect of this pleading is, that

it does not declare that the water of the Hackensack, flowing in its natural condition, would not have inundated this meadow land to the same or to a greater extent than is now the case by reason of the ditch complained of. It does not appear that this act of the defendant has, to the injury of the plaintiff, altered the natural condition of the land. To elucidate, let us suppose this case: That the river water naturally would overflow this meadow; that the defendant prevented such overflow by building an embankment on its own land, and that subsequently it cut a ditch along and through such structure and thereby let in as much water as had originally overflowed the property of the plaintiff; it is obvious that such a course of conduct would not have laid any ground of action, and yet, for aught that appears in these counts, the defendant may have done nothing more than the things above supposed."

The case of Wagner v. Long Island R. R. Co., 2 Hun. 633, was also an action to recover damages against a railway company for constructing an embankment for its road along and across the adjoining land of plaintiff, and in that case, the Court said:

"This is an action to recover damages against the defendant for constructing the embankment for its road along and across the adjoining land of the plaintiff, whereby the usual flow of the water across and off from the plaintiff's premises, was dammed up and obstructed, and caused to accumulate, whereby the plaintiff sustained damage. It seems to be perfectly well settled, that no action will lie against a party for so using or changing the surface of his

own land, as to dam up and obstruct the flow of surface water, which has been accustomed to flow over and across the land of his neighbor. The question involved in the case, is precisely the same in principle, as that which came before the Supreme Court of Massachusetts, in Parks v. The City of Newburyport. In that case, the judge on the trial had instructed the jury, that if, for twenty years, the water accumulating upon the land in the rear of the lots in question, had been accustomed to find its outlet over the land of the defendants, and the same had been obstructed by the acts of the defendants, in such a way as to turn it from their own land across land of the plaintiff, and occasion substantial injury to the property of the plaintiff, without his fault, or want of care on his part, then the defendants would be liable. The plaintiff having recovered under this instruction, the verdict was set aside upon the following opinion by the Court: 'The declaration is for obstructing a watercourse, and the instruction allowed the jury to find for the plaintiff, though there was no watercourse. No action will lie for the interruption of mere surface drainage.' These principles, in the abstract, were conceded by the learned justice who tried the cause; but we think the defendant was deprived of the benefit of them by the refusal to nonsuit, and by certain instructions which were given to the jury. It was left to the jury to find, upon the evidence, whether there existed a watercourse which the defendant had obstructed. We think this was erroneous in the case, both upon the pleadings and the evidence. First, it is to be observed, that the plaintiff did not, in his complaint, claim that there had existed over this land any stream or watercourse which the defendant had obstructed. He says that 'prior to the

construction of such embankment, during the winter season, large quantities of water flowed some distance above the plaintiff's premises, along and parallel with the aforesaid highway, and passed the plaintiff's premises without collecting there.' This is a statement which seems plainly to mean that such had been the natural flow of the surface water; and such, we think, the evidence on the part of the plaintiff plainly showed it to be in fact. The plaintiff's complaint was plainly founded on the theory that the defendant could not lawfully make any embankment on its own land, which would so obstruct the natural flow of surface water during thaws and freshets as to cause it to accumulate on the land of the plaintiff, but was bound, by means of sufficient culverts, or otherwise, to provide some means whereby this water should be disposed of. And the gravamen of the plaintiff's action was the alleged negligence of the defendant in constructing its embankment without providing sufficient pipes and culverts to discharge the surface water. A watercourse, according to the definitions of the authorities, 'consists of bed, banks, and water; yet, the water need not flow continually; and there are many watercourses which are sometimes dry. There is, however, a distinction to be taken, in law, between a regular, flowing stream of water, which, at certain seasons, is dried up, and those occasional bursts of water, which, in times of freshet or melting of ice and snow, descend from the hills and inundate the country. To maintain the right to a watercourse or brook, it must be made to appear that the water usually flows in a certain direction and by a regular channel, with banks or sides. It need not be shown to flow continually, as stated above; and it may at times be dry, but it must have a well-defined and

substantial existence.' * * * Flowing through a hollow or ravine, only in times of rain or melting of snow, is not, in contemplation of law, a watercourse.

"The plaintiff, as we think, not only failed to allege, but also, to give any evidence tending to show the existence of any watercourse which the defendants had obstructed; and the motion for a non-suit should have been granted."

The case of Churchill v. Baumann, 95 Cal 541, was an action to recover damages for the alleged diversion of water from a natural stream. It appears from the facts in that case that the plaintiff participated with and assisted the defendants in maintaining the dam and keeping the dam and ditch in repair, and acted in connection with them in diverting some of the water from the stream by means thereof.

The Court in discussing the doctrine of acquiescence in that case, at page 543, said:

"Counsel for appellant make the point that no estoppel was pleaded by defendants, and therefore the findings of facts from which the conclusion of an estoppel is drawn are outside of the issues. Conceding that there was no issue as to estoppel, it does not necessarily follow that the findings of fact from which the Court drew the conclusion that plaintiff was estopped were not within other material issues; nor does it follow that those findings do not warrant the general conclusion of law that plaintiff was not entitled to recover in this action. The facts found necessarily imply that, from and after October, 1885, until after all the alleged injurious acts

of the defendants had been done, the plaintiff consented to those acts, and consequently was not injured thereby—*volenti non fit injuria.* In commenting upon this maxim, Mr. Broom says: 'It is a general rule of the English law that no one can maintain an action for a wrong where he has consented to the act which occasions his loss,' (Broom Leg. Max side p. 265;) and section 3515 of our Civil Code is to the same effect—"he who consents to an act is not wronged by it." Says Judge Cooley: 'Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. He is not injured by a negligence which is partly chargeable to his own fault."

The case of Southern Marble Co. v. Darnell, 94 Georgia 231, was a suit in equity to enjoin the Marble Company from diverting a stream of water to the damage of the plaintiffs. The defendant Marble Company interposed a demurrer to the complaint. The Court, at page 246, said:

"It was contended on the part of defendant that the plaintiff is estopped from claiming damages, because when the ditch was being dug, he knew the purpose for which it was intended, and not only stood by and saw the work going on, but was actually employed by the defendant to assist in digging the ditch and was paid for this service. If this be true, we think the plaitniff could not afterwards complain that the ditch diverted water from his premises. It would be inequitable and unjust to allow him to recover damages for an injury re-

sulting from this cause. He could not stand by while the ditch was being constructed at a heavy expense, or aid in the digging of the ditch, receiving compensation therefor and making no objection, and then recover damages for the diversion of the water from his premises, when he knew, or ought to have known that this would be the result of the construction of the ditch. Under these facts, he would be estopped from obtaining an injunction against the use of the ditch and the continuous diversion of water thereby."

In the case of Rothschild v. Title Guarantee & Trust Co., 204 N. Y. 458, the Court, at page 461, said:

> "Where a person wronged is silent under a duty to speak, or by an act or declaration recognizes the wrong as an existing and valid transaction, and in some degree, at least, gives it effect so as to benefit himself or so as to affect the rights or relations created by it between the wrong-doer and a third person, he acquiesces in and assents to it and is equitably estopped from impeaching it. This principle is applicable to the facts found and requires the reversal of the judgment."

The complaints allege that when the defendant laid out and constructed its line of railway, "it was compelled to either bridge or fill the natural channel of said Spring Creek at the point where said line of railway and the channel of Spring Creek intersect; and that at such point, defendant railway company made a fill or embankment on its own right of way." (Paragraph 5, Royer Complaint, Trans. p. 4.)

In paragraph 3 of the Royer complaint, it is alleged

that "during certain seasons of the year, caused by the melting of snow, a large volume of water flows down, and is carried off, by the channel of said Spring Creek." (Trans. Royer case, p. 3.)

In paragraph 6 of the Royer complaint, it is alleged that "on the 23rd day of January, 1916, and between January 23d and February 17th ,1916, the waters of said Spring Creek were flowing in great quantity and volume down their natural channel, *the large volume of water therein being due to the melting of the snow,"* etc. (Paragraph 6, Royer Complaint, Trans. Royer case, p 6.)

The allegations in the complaint of Wasson and wife are identical with those in the Royer complaint, and a careful analysis of the complaints conclusively shows that the so-called Spring Creek was not a channel or natural watercouse. It was nothing more than surface water resulting from melting snow flowing in the hollow or ravine. The fact that plaintiffs in their complaints denominated it "a watercourse or creek," does not make it so, especially in view of the fact that the complaints specifically allege all through that the volume of water in this alleged creek or channel was due solely to the melting of snow. These specific allegations control the general allegations in the complaints and determine the character of the actions.

The defendant had the right to protect its property from the surface water resulting from melting snow flowing in this hollow or ravine, and if damage resulted thereby, to the property of plaintiffs, it was *damnum absque injuria.*

There is no allegation in either of the complaints that the alleged flowage of water on the lands of plaintiffs was caused by any negligence on the part of defendant. The only allegation in the complaints upon which plaintiffs can possibly predicate negligence is the following allegation:

> "That said defendant company placed in the bed or channel of Spring Creek a pipe or drain 48 inches in diameter for the purpose of carrying the waters of Spring Creek under its railway bed or fill, and discharging the waters of such creek into its natural bed or channel on the south side of its fill or embankment, *which said pipe or drain was totally insufficient to carry off the waters that would flow down through the natural channel of Spring Creek at certain seasons of the year.*"

When this allegation is read in connection with the other specific allegations in the complaint to the effect that the large volume of water in Spring Creek was due to the melting of the snow, it will be readily seen that this is not a sufficient allegation of negligence.

The complaints also contain the following allegation:

> The plaintiffs allege and aver the facts to be that "in the years 1912, 1914 the waters of said Spring Creek came down in such volume and quantity, the outlet for the discharge at the point herein mentioned being so totally insufficient as to cause said waters to be impounded or dammed by the embankment or fill of said railway with the west side of Spring Creek, and the raise of ground mentioned above, about the east line of the northwest

quarter of the northwest quarter of Section 28 forming sides therefor, causing the said waters to back up against said fill or embankment to an unusual depth, and until such a depth had been reached as to cause the waters thus impounded to break over the fill or embankment of said railway line of the defendant company, and to flow down, over and across the lands" of plaintiffs "in great force and volume, doing great damage thereto, *but for which injury no recovery is sought in this action;* that on each of such occasions portions of the roadbed were washed away and reconstructed by said defendant company in the same manner as originally constructed, and no adequate provision being made by such company to permit the waters going down the natural channel of said Spring Creek to pass in their accustomed way, or in any other way than through the 48-inch drain pipe, as heretofore specified." (Trans. Royer case, page 5.)

It clearly appears from this and other allegations in the complaints, that although plaintiffs had resided in that community for several years, and were familiar with the climatic conditions, and had full knowledge of the manner of construction of said embankment and drain, and that the water had flowed down, over and across their lands in the years 1912 and 1914, causing, as they say, great damage thereto, they made no claim whatever for damages by reason thereof; and there is no allegation in the complaints that the plaintiffs or either of them at any time protested against, or made any objections to, the maintenance of this embankment and drain as the same was constructed; but, on the contrary, it clearly appears from the complaints, that they acquiesced in the maintenance of said drain.

The rule is well settled that no one can maintain an action for a wrong where he has consented to the act which occasioned his loss; and it is equally well settled that plaintiffs could not stand by while this embankment or drain was being reconstructed, presumably at a heavy expense, and subsequently recover damages for injuries to their property resulting, as they allege, by reason of the drain being wholly insufficient to carry off the waters that would flow down through the alleged channel of Spring Creek.

The plaintiffs with full knowledge of their rights, having made no claim for the damages which they say they sustained in 1912, 1914 by reason of the alleged faulty construction of this embankment and drain, the defendant had the right to suppose that they assented to the manner of the construction, and acquiesced in the maintenance thereof, and they were estopped by their conduct from maintaining this action.

IV.

A water course is a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry; it must flow in a definite channel, having beds and banks, and usually discharges itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of the tract of land, occasioned by unusual freshets, or other extraordinary causes. It does not include the water flowing in hollows or ravines in land, which is mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at all other times are destitute of water. Such hollows or ravines are not water courses.

Weil on Water Rights (3rd Ed.), page 354.

Angell on Water Courses, Sections 3-7.
Weis v. City of Madison, 75 Ind. 241.
Wagner v. L. I. R. R., 2 Hun. 633.
Thorpe v. Spokane, 78 Wash. 488.
Hagge v. Ka. City St. R. Co., 104 Fed. 391.

The case of Thorpe v. City of Spokane (78 Wash. 488), was an action to recover damages alleged to have been caused by the city so negligently grading its streets as to cause the plaintiff's premises to be flooded. The city denied that it had negligently caused the water to be cast upon the plaintiff's premises. Upon this issue the cause was tried to the Court and a jury. At the close of the evidence the Court directed a verdict to be entered in favor of the defendant. One of the questions involved was whether or not the "old channel" referred to in the case was a natural water course. Upon this question, the Court, at page 489, said:

> "It is contended by the appellants that this old channel is a watercourse, and that the city was liable upon an initial grade for obstructing this watercourse. Much evidence is quoted in the appellant's brief to show that the old channel was a natural watercourse. We think it is conclusively shown by the evidence that water never flowed in this old channel, except when the ground was frozen and snows melted in the late winter or early spring upon such occasions water would flow down this old channel; but at other times there was no water therein. We are satisfied that this does not make a natural watercourse, because it is apparent that the water that flowed down this old channel was mere surface drainage over the entire face of the tract of land mentioned, occasioned by unusual freshets and nothing more."

V.

Mere surface water, or such as accumulates by rain or the melting of snow, is to be regarded as a common enemy, and the proprietor of the lower tenement or estate may, if he chooses, obstruct and hinder the flow of such water, and in doing so may turn it back upon and across lands of others without liability for injury ensuing from such obstruction.

Angell on Water Courses, Sections 4-7.
Gould on Waters, Section 267.
Chadeayne v. Robinson, 55 Conn. 345.
Robinson v. Shanks, 118 Ind. 125.
Greeley v. Maine Central Railroad, 53 Me. 200.
Morrison v. Bucksport & Bangor, 67 Me. 353.
Ashley v. Wolcott, et al., 11 Cush. 192.
Park v. City of Newburyport, 10 Gray 28.
Gannon v. Hargdon, 10 Allen 106.
Treichel v. Great N. Ry. Co., 80 Minn. 96.
Munkers v. Ka. City & St. Joe & Council Bluffs Railroad Co., 60 Mo. 334.
Abbott v. K. St. J. & C. B. R. Co., 83 Mo. 271.
Collier v. C. & A. Ry. Co., 48 Mo. App. 398
Morrissey v. Chi. B. & Q. R. R. Co., 38 Neb. 406.
Wagner v. Long I. R. R. Co., 2 Hun. 633.
Edwards v. Charlotte C. & A. R. Co., 39 S. C. 472.
Cass v. Dicks, 14 Wash. 75.
Harvey v. N. P. R. R. Co., 63 Wash. 669.
Lessard v. Stram, et al., 62 Wis. 112.
Central Trust Co. v. Wabash St. L. & P. Ry. Co., 57 Fed. 441.
Hagge v. K. C. St. Ry. Co., 104 Fed. 391.
U. P. R. R. Co. v. Campbell, 236 Fed. 708.
Walker v. N. Mex. & S. P. Ry. Co., 165 U. S. 593.

The case of Robinson v. Shanks (118 Ind. 125), was a suit to enjoin the diversion of a watercourse. In that case, the Court of its own motion gave the jury the following instruction:

> "The complaint asks damages against the defendants for obstructing the flow and diverting the course of an ancient watercourse. To constitute a running stream or watercourse, for the obstruction of which an action will lie, there must be a stream usually flowing in a particular direction, though it will not flow continually; it may sometimes be dry; it must flow in a definite channel, having a bed, sides or banks, and must usually discharge itself into some other stream or body of water; it must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary cause; it does not include the water flowing in hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from higher to lower lands, but which at other times are destitute of water. Such hollows or ravines are not, in legal contemplation, watercourses, for the obstruction of which an action will lie; and if you believe from the evidence in this cause that the only flow of water in said run or ravine, described in the complaint, was rain falling upon and snow melting upon and running down from the surface of an entire tract of higher land into a hollow or ravine, and by such course carried to lower land, then said Leeper's run was not a watercourse within the meaning of the law, and then it would be your duty to find for the defendants."

It was claimed by the appellant that the instruction was erroneous. The Court, in discussing this question at page 134, said:

> "It is objected to this instruction that it is too refined and restrictive in the application made to the particular case. There is evidence, however, in the record to which it is applicable."

The case of Gannon v. Hargadon, 10 Allen 106, was an action to recover damages for the diversion of a stream of water so that it flowed upon the plaintiff's land. On the trial, the defendant requested the Court to instruct the jury as follows:

> "If the defendant placed sods in the cart ruts upon the way over his own land from time to time, as the ruts were made by the passing of the cart, and he did this merely to prevent the water from making channels of such ruts, and gullying and washing away and injuring said way and the land of the defendant, and such water was not that of a watercourse but merely surface water caused by the melting of snows and the fall of rains in the spring, and flowed on to the defendant's land from land above his own, and if in consequence of the placing of said sods the said water which would otherwise have run down said ruts was diverted upon the plaintiff's land, the defendant is not liable therefor. The plaintiff had no right that the ruts made on the defendant's land should be kept open."

The trial Court refused to give said instruction, which was assigned as error. On appeal, the Court, Bigelow, C. J., at page 109, said:

"It seems to us that the instructions for which the defendant asked should have been given, and that those under which the case was submitted to the jury were not in accordance with the principles recognized and adopted in cases recently adjudicated by this Court. The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow.

"The point of these decisions is, that where there is no watercourse by grant or prescription, and no stipulation exists between conterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control the surface drainage of water can be asserted by the owner of one lot over that of his neighbor. *Cujus est solum, ejus est usque ad caelum* is a general rule, applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land above, upon and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the

lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil. This principle seems to have been lost sight of in the instructions given to the jury. While the right of the owner of land to improve it and to change its surface so as to exclude surface water from it is fully recognized, even although such exclusion may cause the water to flow on to a neighbor's land, it seems to be assumed that he would be liable in damages, if, after suffering the water to come on his land, he obstructed it and caused it to flow in a new direction on land of a conterminous proprietor where it had not previously been accustomed to flow. But we know of no such distinction. A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damages to adjacent land, it is *damnum absque injuria.*"

The case of Munkers v. Kas. City, St. Jo. & Council Bluffs R. R. Co., 60 Mo. 334, was, among other things, an action for damages for alleged diversion from its

natural course and channel of a stream of water, causing it to flood the lands of plaintiff. In that case, the Court, at page 339, said:

> "Damages were claimed, in the second count, for a diversion, by the defendant, in the manner therein stated, of a certain stream of water from its natural course and channel, whereby plaintiff's fields were flooded. There was testimony tending to show that no natural watercourse was interfered with by the defendant, but that the plaintiff was injured alone by surface water. If plaintiff's injuries were occasioned by flooding from surface water, and not by the diversion, by the defendant, or its predecessor, of a natural watercourse, then there could be no recovery on the second count. This question should have been submitted to the jury under instructions explaining the difference between surface water and a natural watercourse, and defining the duties and liabilities of the defendant arising from the construction and operation of its road across or along a running stream. This was not done."

In the case of Edwards v. Railroad Co., 39 S. C. 472, the facts which are stated in the opinion, are as follows:

> "The plaintiff who is a married woman, joining her husband with her as co-plaintiff, brings this action against the Charlotte, Columbia and Augusta Railroad Company, to recover damages alleged to have been done to her property, as well as to her health, by reason of the obstruction by the defendant company of the natural flow of surface water over and across the right of way and railroad track

of defendant. The allegations in the complaint, substantially are, that some time in the year 1867 the defendant company constructed its railway through the town of Graniteville, over and along Canal street of said town, running north and south, parallel with Horse Creek, a natural watercourse, on the west of the railway; that plaintiff is the lessee of certain premises situate at the northeast corner of Canal street and Cottage, the latter being a street running perpendicular to the former; that on the eastern side of the town of Graniteville, the land is hilly, and gradually slopes towards Horse Creek, and that the surface water which would accumulate on the eastern side was accustomed to flow, in part, down and along Cottage street, across Canal street, to said Horse Creek, previous to the construction of defendant's road, and for some time afterwards, without injury to plaintiff's premises, but that some time in the year 1878, 'the defendant negligently, unlawfully and unnecessarily' erected a large sand bank at the intersection of Canal and Cottage streets, whereby the surface water was forced back on plaintiff's premises, and has continued to maintain and increase said sand bank.

"The defendant claims that the sand bank complained of (which was constructed on defendant's right of way) was necessary to protect its roadbed and right of way from being undermined and washed away by the flow of the surface water, and, therefore, its construction was no invasion of the legal rights of the plaintiff, and the defendant is not liable for any damages which plaintiff may have sustained by reason of such obstruction of the flow of the surface water."

The Court in discussing the question as to whether

or not the water diverted was surface water or the waters of a natural watercourse, at page 474, said:

> "It is not, and cannot be, denied that the rule in regard to interference with the flow of surface water is wholly different from that which prevails in regard to the waters of a natural watercourse. We shall, therefore, confine our attention entirely to the rule as to surface water. What that rule is has been the subject of debate in numerous cases in the other states, many of which we have examined in preparing this opinion. Some of the states have adopted what is known as the civil law rule, while others seem to have adopted what is designated as the intermediate rule, while others again (a majority of the states, as is said in a note to Goddard v. Inhabitants of Harpswell, 30 Am. St. Rep., at page 391), adhere to the rule of the common law. In this state, so far as we are informed, there is no ajudiciation upon the subject, for what was said upon the subject by the late Chief Justice Simpson was 'not intended as a final adjudication, and conclusive of said question in the future,' as he himself expressly said in that opinion, but simply his own opinion as to the comparative merits of the several rules.
>
> "But in view of the express declaration of the law-making power, as embodied in section 2738 of the General Statutes, we feel bound to declare, in the absence of any constitutional provision, statute or even authoritative decision to the contrary, that the common law rule must still be recognized as controlling here, for that section expressly declares that: 'Every part of the common law of England, not altered by this act nor incon-

> sistent with the Constitution of this state, and the customs and laws thereof, is hereby continued in full force and virtue within this state in the same manner as before the passage of this act.' Under the common law rule, surface water is regarded as a common enemy, and every landed proprietor has a right to take any measures necessary to the protection of his own property from its ravages, even if in doing so, he throws it back upon a coterminous proprietor to his damage, which the law regards as a case of *damnum absque injuria,* and affording no cause of action."

The case of Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, was an action to recover damages from an overflow of lands alleged to have been caused by wrongful obstructions by the company of a natural watercourse. The complaint, in substance, charged that the defendant obstructed the natural and artificial watercourses by which the waters from the north and west of the plaintiff's property, and from the Socorro and Magdalena mountains, in their natural flow and fall passed over the lands of the plaintiff and other lands, and emptied into the Rio Grande. The defendant company contended that there were no natural watercourses obstructed by the defendant's roadbed, and that the water which did the damage was simply surface water. The Court, in discussing this question, said:

> "Does a lower landowner by erecting embankments or otherwise preventing the flow of surface water on to his premises render himself liable to an upper landowner for damages caused by the stopping of such flow? In this respect, the civil and common law are different, and the rules of the two

laws have been recognized in different states of the Union—some accepting the doctrine of the civil law, that the lower premises are subservient to the higher, and that the latter have a qualified easement in respect to the former, an easement which gives the right to discharge all surface water upon them. The doctrine of the common law, on the other hand, is the reverse, that the lower landowner owes no duty to the upper landowner, and that each may appropriate all the surface water that falls upon his own premises, and that the one is under no obligation to receive from the other the flow of any surface water, but may in the ordinary prosecution of his business and in the improvement of his premises by embankments or otherwise, prevent any portion of the surface water coming from such upper premises. * * *

"It would be useless to cite the many authorities from the different states in which on the one side or the other these doctrines of the civil and the common law are affirmed. The divergency between the two lines of authorities is marked, springing from the difference in the foundation principle upon which the two doctrines rest, the one affirming the absolute control by the owner of his property, the other affirming a servitude, by reason of location, of the one premises to the other. * * *

"If a case came to this Court from one of the states in which the doctrine of the civil law obtains, it would become our duty, having respect to this which is a matter of local law, to follow the decisions of that state. And in like manner we should follow the adverse ruling in a case coming from one of the states in which the common law rule is recognized."

VI.

(a) Where a railroad culvert is sufficient to pass the usual amount of water resulting from melting snow, the railway company is not liable for damages to property because of the culvert being insufficient to carry off the waters of an extraordinary and unexpected flood.

Norris v. S. F. & W. Railway Co., 23 Fla. 182.
Cottrell v. Marshall Infirmary, 70 Hun. 495.
B. & O. R. Co. v. Sulphur Springs Ind. School Dist., 96 Pa. St. 65.
Central Trust Co. v. Wabash St. L. & P. R. Co., 57 Fed. 441.

The case of Central Trust Co. v. Wabash St. L. Co., 57 Fed. 441, was an action for damages for injury sustained by reason of a flood caused by an alleged insufficient culvert. The facts in that case are set out fully in the opinion.

The Court, in discussing the question of the liability of the receiver of the railway company, at page 445, said:

> "It is, however, insisted that the receiver is responsible for damages from floods occasioned by unsual and extraordinary rainfalls, because they might have been foreseen and guarded against by the exercise of ordinary and reasonable foresight, care and skill in the construction of a sufficient culvert and embankment. A railroad company, acting in pursuance of legislative authority, is only required to exercise reasonable diligence and precaution in constructing passageways for the water through its bridges and embankments, and is entitled to select a safe and massive structure, in pref-

erence to a lighter one, which would less obstruct the water. It is not liable to an action for damages if it fails to construct a culvert or bridge so as to pass extraordinary floods."

(b) A railroad company is not required to construct culverts or passageways through its embankment for the passage of surface water from the lands of others:

Egener v. N. Y. & R. B. Ry. Co., 38 N. Y. Supp. 319.

VII.

The court should have directed the jury to find a verdict in favor of the defendant and against each of the plaintiffs in these actions, as requested by the defendant, and entered a judgment dismissing the complaints herein.

The defendant was entitled to a directed verdict and judgment against each of the plaintiffs for the following reasons:

(a) The complaints herein do not state facts sufficient to constitute causes of action.

(b) Spring Creek is not a natural watercourse.

(c) There were no natural watercourses obstructed by the defendant.

(d) The waters which flowed upon the lands of plaintiff were surface waters only.

(e) The flowage of water upon the lands of plaintiffs was not caused by any negligence of the defendant.

(f) Plaintiffs with full knowledge of the manner of construction of said embankment and drain, and of their rights in the premises, acquiesced in

the maintenance thereof, and were thereby estopped from maintaining this action.

(g) The injury, if any, to the property of plaintiffs, was the result solely of an extraordinary and unexpected flood.

(h) The drain or culvert in the embankment of defendant was sufficient to pass the usual amount of water resulting from melting snow, and the company was not liable for damages to the property of plaintiffs because of the culvert being insufficient to carry off the waters of an extraordinary and unexpected flood.

(i) The defendant was not required to construct any culvert or drain through its embankment for the passage of surface water from the lands of others.

(j) The evidence in these cases is wholly insufficient to support or sustain a verdict and judgment for the plaintiffs.

VIII.

The court should have given the instructions requested in the Assignments of Error numbered I, II, III and IV. The court erred in giving the instruction set out under Assignment of Error number V for the reason that the court, in effect, instructed the jury that Spring Creek was a natural watercourse, whereas the court should have instructed the jury that the waters were surface waters only, resulting from melting snow flowing down a ravine or hollow.

The testimony in these cases is as follows:

Testimony.

Guy H. Heiberling,

A witness for plaintiff, testified:

Direct Examination.

County Engineer of Benton County, Washington. Plaintiff's Exhibit "A," a map of the lands of Wasson and Royer, was prepared by me. (The map was admitted in evidence for the purpose of illustration.) Spring Creek originates about fifteen miles to the north and west of the Wasson and Royer land. The county road follows along the center line east and west through Section 28, and Spring Creek lies immediately east of the county road as established at the present time. The land of Mr. E. B. Starkey is shown on the map. I took levels where Spring Creek crosses the line between Sections 20 and 29, and also where same crosses the O.-W. R. & N. right of way, and found the fall to be about 8.6 feet in one thousand. The drain under the O.-W. R. & N. tracks, where Spring Creek flows under, consisted of one 48-inch corrugated metal culvert, which was about four feet below the top of the track. At this point the line of the O.-W. R. & N. Co. is on an embankment or fill, which is about eight feet deep. The fill extends from the creek six or seven hundred feet east of the county road over in Section 28, where it passes from embankment to a slight cut.

With the exception of a few months, I have lived in Benton County since the fall of 1908. Plaintiff's Exhibit "B," purporting to be a map of part of Benton County issued by the Department of the Interior, is shown me and I can trace from this map the course of Spring Creek. The upper limits of the head show in Sections 25, 11 and 24, and it runs generally southeasterly at the head and bears southwesterly for three or four miles, then southeasterly into Yakima River.

The topography of the land from where Spring Creek has its origin is rolling, but Spring Creek is in a canyon until a short distance from the O.-W. R. & N. right of way, where the ground spreads out flat. The channel is well defined and drains twenty or twenty-five thousand acres coming down from various gulches into the Spring Creek Gulch. The fall from the source to where it crosses the right of way of the O.-W. R. & N. Co. is something over two thousand feet. Where Spring Creek runs under the right of way of the O.-W. R. & N. Co. there has been a fill on each side of the creek. On the east side the grade tapers gradually to nothing in about thirteen or fourteen hundred feet. The annual snowfall in the hills north of the railroad right of way varies from nothing to as high as 18 inches. In January, 1916, at Prosser there were two different snowfalls—one of these twelve and the other fifteen inches—and there is usually heavier snow in the hills. This snow generally begins to melt whenever the chinook winds come, and it melts rapidly then.

Cross Examination.

Spring Creek, from the section line of 20 and 29, meanders back and forth. One standing in the bottom of Spring Creek at the O.-W. R. & N. right of way, attempting to look up towards Mr. Starkey's place north, will find the creek so crooked that a straight line vision will not pass up the creek channel. The gully from which Spring Creek comes out of the Rattlesnake Hills begins to widen at point about the north line of the southeast quarter of the southeast quarter of Section 20. Mr. Starkey has quite a flat place—about ten

acres or so, which would be located substantially in the southeast quarter of the southeast quarter of the southeast quarter of section 20. The base of the bluff is about the section line between 20 and 29 on the west side of the creek. (Trans. pp. 19-21.)

PRESTON ROYER,

One of plaintiffs, as a witness on the part of plaintiff Wasson, testified:

Direct Examination.

I own the lands described in my complaint, amounting to practicaally nineteen acres. I bought the land in the spring of 1914. I have lived along the branches of Spring Creek since the fall of 1905, and at one time lived in the Rattlesnake country, Spring Creek passing through my homestead. *The waters coming down Spring Creek is caused by the melting snow and it comes down in a series.* In that country our weather goes in a circle—we will have a per iod of dry seasons, very little moisture, poor crops, and a series of good moisture and good crops. Spring Creek runs practically every year, when there are good crops, and in dry seasons, does not run at all. In 1907, the water down Spring Creek went through a 24-foot breach, practically four feet deep. There is no outlet other than under the O.-W. R. & N. crossing. From 1906 to 1912, there was water in more or less volume running each season. This water flows to the Yakima River, and the only outlet is under the O.-W. R. & N. tracks. In June or July, 1914, the water crossed my ranch.

In 1914, in the last of June or the first of July, there was a freshet in the Rattlesnake Hills in the water-

shed of Spring Creek, and water ran down this creek to where same intersects with the O.-W. R. & N., where they have a 48-inch pipe. It was not sufficient to carry the water off and it backed the water up and it flooded straight east and went down the pit to the county road, washed out the county road to a considerable depth, and went on down where the railroad comes to the surface grade and crossed right through and ran off for five or six hours over our place. (Trans. pp. 22-23.)

The banks of Spring Creek vary, being well defined for probably fourteen miles above Mr. Starkey's place, there are distinct channels and have to be bridged; they expect water in these, and they put in bridges. In 1916, on January 20th, there was from twelve to sixteen inches of badly drifted snow, and Spring Creek and the ditches and canals up to the top of the hill were leveled across in many places, practically no snow on the level lands but the snow was drifted into depressions. From the level lands to a distance of five or six miles up the Rattlesnake slope there was no snow. Above that, there was. Also the canyons are much deeper at the top, and these were full of snow. The ground was frozen and the water could not go into the ground. The chinook winds started at 11:30 January 20th and stopped at night. January 21st a southwest wind, mostly clear, and checked at night. January 22d, southwest wind. The snow melted and the high water went across my place at 5 o'clock and run about five hours in the afternoon. It destroyed the roadbed at a great distance, broke through a stretch of railroad track, went over the ties and washed a deep hole through the railroad on to the Wasson land and then to my land. On Monday fol-

lowing there was a cold northeast wind and it froze hard, which checked the flow of the water. Weather stayed frozen and we got some snow, probably fifteen inches, until the next chinook came. The next chinook wind started February 7th and was a clear day—with from twelve to fourteen inches badly drifted snow. The wind changed and on February 9th the water started running, and on the 10th the water went over my place and over the Wasson place. The water backed up on the north side of the embankment and run down a borrow pit east and then passed across the railroad track, and down over Mr. Wasson's land and my land until it met the old channel of Spring Creek.

With respect to the Wasson land, this land slopes southeast and was planted to alfalfa, and when the water came over that land would wash holes, many of them fifteen feet long and three or four feet wide, making it impossible to irrigate it and impossible to go over it with a cutting machine. The water went over my land and washed the soil somewhat. (Trans. pp. 25-26.)

* * * * *

Cross Examination.

The Wasson place was covered with water in 1916 to the extent of between 40 and 45 acres. When the water came down on the 23d of January, it ran for five hours * * *. Between the 23d of January and the 7th of February about fifteen inches of loose snow fell, followed by freezing weather, and no water came down until about the 7th of February. The water would check at night and flow again in the day-time. I have been acquainted with Spring Creek since 1905. *The creek*

is always dry in the summer, above the Government canal. It is dry in the aggregate over eleven months in the year, and sometimes it does not run that month. There must be snow in the hills to put water in that channel, by the chinook winds. If it melts gradually, and no frost in the ground, you have no water in Spring Creek. If it melts off in the winter, melts gradually, it probably runs in warm weather. *The chinook was what brought the water down.* The gully through which the water drained was practically drifted full of snow. *After January 23d, when the 15-inch snowstorm came, a second chinook wind came and the snow became more dense and more dense, until it finally became water in part, and started to flow down.* The snow that had not yet congealed would hold it back for a while until the water would break through and it would come down in bunches, and the channel on the flat between the O.-W. R. & N. and Starkey's place would possibly have a tendency to fill up and cause the water to spread. Spring Creek channel at my place was full of snow at that time and it had to work down gradually. I did not farm my place in 1916. (Trans. pp. 28-29.)

SAMUEL H. MASON,

A witness for plaintiff, testified:

Direct Examination.

I homesteaded the Wasson place in 1900, owned it about ten years. I am acquained with Spring Creek where it now leaves the O.-W. R. & N. right of way to the Yakima River, approximately a couple of miles. The channel is not regular—in places good and wide

and other places deep. It is about four to eight feet at the bottom, the depth being irregular. * * * *The water came there in the channel in the spring when the snow would come on the Rattlesnake Hills, and melt off suddenly.*

These waters passed through the channel to the river, and at my place at the deepest time it was probably two to two and one-half feet deep, and in the narrower places deeper. While I owned the place the waters never came over the land. It generally followed the course of the creek—only time it got over was when banked up but not washed down over the land.

Cross Examination.

Spring Creek carries water only during the spring freshets. The time would vary. The only time I knew water to run there any time was when the snow would come on the Rattlesnake Hills and would melt and go off suddenly; would seem to absorb the water in the winter time when it went off gradually, but when the sun and wind melted it suddenly always had these freshets in the spring. The time of the melting depends entirely on the presence or absence of these chinook winds. * * * I never saw it in going off, last as long as ten to twenty days as a rush of waters, but when this water run down there in the creek it would be a month or so until it all went away when plenty of snow in the mountains, but a rush of waters would be generally two, three or four days. Spring Creek is dry a good deal of the time. *I don't think water runs there regularly from freshets over two months of the year.* (Trans. pp. 23-25.)

M. C. Williams,

A witness for the plaintiff, testified:

The railroad track runs approximately east and west, and the grade of the track where it crosses Spring Creek is one-fifth of one per cent, ascending towards Grandview. * * *

The original right of way of the railroad company was forty feet on each side of the center line of the railroad. Afterwards, the property owners immediately adjoining the right of way on the north added an eighty-foot strip clear across the forty acres at Biggam. That would make 120 feet on the north side and 40 feet on the south side. The 80 feet has since been deeded to the county for road purposes. (Trans. pp. 29-33.)

Lee M. Lamson,

A witness for the plaintiff, testified:

Direct Examination.

County Agricultural Agent of Benton County; have been for five years; acquainted with the Wasson and Royer land prior to January, 1916; examined the Royer land at Mr. Royer's request to give him advice whether the corn needed irrigation. There were six or seven acres of corn and probably five acres or so of a poor stand of alfalfa. The soil is very fine sand, with a gravel subsoil. I examined the land in March, 1916. The flumes were torn down, the land was cut up pretty badly with little rivulets. In a good many places the surface soil was washed off entirely, so it was washed down to the gravel. The humas which was on the sur-

face was washed off. I went over the Wasson land at the same time. The water had cut out ravines. A good many were from a foot to two feet deep—some were less. The alfalfa crown were all the way from three to ten inches above the ground. The irrigation ditches were hardly recognizable. The only practical thing to do would be to plow it up and relevel it and reseed it. (Trans. pp. 29-30.)

Cross Examination.

I did not measure the amount of land upon the Wasson place that the water passed over, although the line of the flow was fairly well marked with drift weeds. The water did not go over all of the land below the railroad track. * * * I examined the land north of the railroad; nothing washed out there but some soil washed on to it. (Trans. p. 31.)

LUKE POWELL,

A witness for the plaintiff, testified:

Direct Examination.

Distrct Horticulturalist, State of Washington; acquainted with the Wasson and Royer land about January 1, 1916; was with Mr. Lamson and went over the land in March of that year. The soil was washed and a number of gullies washed, from six to eighteen inches and as wide as a foot to 18 inches. (Trans. p. 31.)

WILLIAM J. WASSON,

One of plaintiffs, as a witness on the part of plaintiff Royer, testified:

Direct Examination.

Owner of the land described in the Wasson complaint; was at Centralia, Washington, at the time of the flood in 1916, came to Prosser March 2d, went over the land and saw the flooded area. The irrigating ditches were washed out; the rows that you irrigate with were washed and cut crossways so that you could not possibly carry water down over it and irrigate it. I should judge in the neighborhood of forty-five acres of my land was left in this condition. * * * The water crossed the railroad track practically 150 feet wide and as it came down over my place, it spread out. (Trans. pp. 32-33.)

M. C. Williams,

A witness for defendant, testified:

Direct Examination.

I am the same witness that was on the stand for plaintiff. I was resident engineer in charge of construction. The definite location of the railroad across the land in controversy was made before I went on the work but I was resident engineer when *the track was building.* This was *in 1910 and 1911.* I have been acquainted with the drain called Spring Creek since 1907. I have been back and across this territory a number of times between those dates connected with the defendant in an engineering capacity. *I prescribed the size of the culvert at Biggam after inquiring as to water conditions from residents in the immediate vicinity who had lived there a number of years, and after such inquiry I put in a culvert 48 inches in diameter, circular in form. From the information received, it was my*

opinion this 48-inch diameter was sufficient in size to carry off the normal flow of surface water that came down. The water flowage conditions in 1916 in Yakima Valley and throughout the eastern part of Washington in January, 1916, were far greater than any since 1906. There was more run off and more snow. In the winter of 1915-1916, there were two heavy snows in the early part of the year 1916. One was twelve to fourteen inches, which all went off the ground, and was followed by a twelve to eighteen inch snow after that, which went off in the early part of February. Plaintiff's Exhibit "B" is a topographical map of the Prosser quadrangle, including Sections 20, 21, 28 and 29, the lands in question; contains contour lines showing points of similar elevation on the natural surface of the ground. The contour distance is fifty feet. Am acquainted with the location of Sunnyside canal. During the winter season the spillway has been left open, whereby melting water drains into the canal, and from that into Spring Creek. Referring to the course of Spring Creek from the county road south of Starkey's place, there is a small rock dam near the fence, and as you go up the channel there are several other small obstructions, but the main dam is the one that has been put in by the Sunnyside Reclamation people, which is the outlet of the lateral that runs around the base of the hill. The dam is in the neighborhood of four feet in height. Document marked for identification, Defendant's Exhibit No. 1, is a blueprint map showing the area in controversy prepared under my direction, illustrating the land of Mr. Starkey, Mr. Wasson and Mr. Royer, Biggam Station and the course of certain channels and drains made from surveys, and also showing the course of the water and the

overflow, which was received in evidence and marked Defendant's Exhibit No. 1. After the water passed over the wasteway, the water came down in such volume that the original channel was so small as to be unable to carry the water, and it overflowed and spread out over the land, forming two channels in Mr. Starkey's field, one marked on the map "original channel" and the other "overflow channel." It passed on down to the next forty below, which would be the southeast quarter of the southeast quarter of Section 20, and the channels came together again as a main channel with the exception the water spread out to a considerable extent on the ground. The water overflowed the greater part of Mr. Starkey's land, running entirely out of the channel, and then as it comes to the south line of Section 20 it strikes the other dam, which had been put in just north of the county road and again spread out, and as a matter of fact considerable amount of it has never struck that dam as the elevation of the dam has nothing to do with that just above the southeast quarter of Section twenty. The colored area on the map, Defendant's Exhibit No. 1, across the land of Mr. Wasson and part across Mr. Royer's land, illustrates the course of the water, and the map was made from notes of surveys taken shortly after February, 1916. The part colored purple illustrates the exterior areas of the flowage, and shows the overflow just as it happened.

Cross Examination.

Before I put the 48-inch pipe in, I made inquiry from residents in and around Biggam as to flowage of water down Spring Creek, also made an independent

investigation by going practically to the foot of the main Rattlesnake Hills, where the three branches of Spring Creek come in; also consulted a government survey which I believe was made by the Reclamation Service, also took into consideration that the spill-way from the Sunnyside Canal would dump some water therein. I figured about twenty-second feet would be the flow. (Trans. pp. 39-42.)

EDWARD L. SHORT,

A witness for defendant, testified:

Direct Examination.

Occupation, civil engineer, five years in the employ of defendant, headquarters, Walla Walla, third district, including Yakima branch. At request of defendant surveyed the lands in questions, first on the 21st and 22d of March, 1916; made the notes of Defendant's Exhibit No. 1 and measured the area of the overflow on the Wasson and Royer lands. The line between the area overflowed and the area not overflowed could be found and distinguished by small drifts or weeds that had lodged against the alfalfa. The map has marked upon it the different areas of land and those figures are correct. (Trans. p. 42.) * * * *

I made a survey for the purpose of determining the lay of the ground on that area bounded by the railroad track on the south and Mr. Starkey's farm on the north, the county road on the east and Spring Creek on the west, and made a map marked for identification, Defendant's Exhibit No. 2, which was prepared from my notes, which exhibit was offered and admitted in evi-

dence and marked Defendant's Exhibit No. 2. I run levels on certain lines marked a, b, c and d. This map correctly shows the lay of the ground. Water on the southeast corner of Mr. Starkey's field, the southeast quarter of the southeast quarter of Section 20, would flow almost directly south from this point to the southeast and would not flow to the culvert. The line of levels marked C and D show the ground to be higher than further east. Water flowing from Mr. Starkey's field would flow right across the county road. The arrows on Defendant's Exhibit No. 1, indicate the course of the water. (Trans. pp. 49-50.)

ALFRED GOBALET,

A witness for defendant, testified:

Direct Examination.

Civil engineer and draftsman; residence Walla Walla; was with Mr. Short on the day certain surveys were made in respect to Royer and Wasson lands. The exterior lines of the portion colored purple on Defendant's Exhibit No. 1, were arrived at by indications of sediment that was carried by the water and left on the alfalfa and by little straws that the water left on the outer edge. The areas in the map are correct. (Trans. pp. 42-43.)

E. E. STARKEY,

A witness for defendant, testified:

I lived on the land illustrated by Defendant's Exhibit No. 1 and marked "E. E. Starkey," which would be the southeast quarter of the southeast quarter of

Section 20; lived there nine years; was on the farm in January, 1916. In January, 1916, Spring Creek drain overflowed the western part of the north half of the north forty, breaking out of the natural channel, and flowed out inside the opening where it drains south and west to a limit probably 150 yards, spreading out over the land to what is known as the government dam and below the dam I had constructed a new channel to check up against it and prevent washout. Next day when the water came, it broke over at the point where the arrows on Defendant's Exhibit No. 1 show at the point called "plow land." The creek bed at that time was full of snow and ice. The first flow could not get through the channel because of the ice and snow. At the south line of my place I constructed a check, consisting of a rock dam, probably eighteen inches to two feet high, and I had a dike along the south side of my place to check the sediment. I have been acquainted with the Wasson lands for eight years and have been over a considerable part of it during the time of the flood last winter, a year ago, and I have been over it several times since. I have helped harvest crops on the land several times and have mowed the crops of the Royer place. The water entered Mr. Wasson's place in 1916 in two different places, at the railroad east of the county road and at the west side where it broke through the railway. Where the water left the railroad right of way, it was from forty to sixty feet wide and very shallow, and its greatest width was probably 350 feet. Part of it turned east where there was a wagon road, illustrated on Defendant's Exhibit No. 1, as "blown out wagon track, northwest channel." In Mr. Wasson's place it spread out considerably but did not flow deep at any point, and washed out the dirt

from the irrigation ditches and between the alfalfa somewhat. I do not think the general width on the Wasson place was over an average of seventy-five feet. It did spread, however, to twice that width, especially when this water came in from the west side. The soil on the Wasson land is particularly clean of rock; there is one little gravel bed not very far from where these two streams met and there were no washes to amount to anything. The wash covered possibly three and a half to four acres. * * * I was over the Royer place several times. I frequently cross it—over it first in 1910 and frequently since. The point where the water entered the Royer land was of fairly slight slope, there was from one and a half to three acres covered by the water. (Trans., pp. 45-47-48.)

B. R. Sherman,

A witness for plaintiff, testified as follows:

Direct examination.

The waste water from Mr. Starkey's ranch in 1916 never went any further than this corner, referring to the corner caused by the county road crossing the railroad. (Trans., p. 50.)

ARGUMENT.

The questions raised under points numbered IV, V, VI, VII and VIII, involving as they do practically the same questions, may be considered together.

The paramount question involved in these cases is whether or not Spring Creek is a natural watercourse, or whether it is a ravine or hollow through which mere

surface water flowed resulting from rain or melting snow.

Preston Royer, one of the plaintiffs, on direct examination, testified that the waters coming down Spring Creek were caused by the melting of snow, and on cross-examination, he testified (using his own language): "The creek is always dry in the summer above the government canal. It is dry in the aggregate for eleven months in the year, and sometimes it does not run that month. There must be snow in the hills to put water in that channel by the chinook winds. If it melts gradually and no frost in the ground, you have no water in Spring Creek." "The chinook wind was what brought the water down." "After January 23d, when the 15-inch snow storm came, a second chinook wind came and the snow became more dense and more dense until it finally became water in part and started to flow down."

Samuel H. Mason, a witness for plaintiffs, on direct examination, testified (using his own language): "The water came there in the channel in the spring when the snow would come on the Rattlesnake Hills and melt off suddenly," and on cross-examination, he testified: "Spring Creek carries water only during the spring freshets. The time would vary. The only time I knew water to run there any time was when the snow would come on the Rattlesnake Hills and would melt and go off suddenly; would seem to absorb the water in the winter time when it went off gradually, but when the sun and wind melted it suddenly, always had these freshets in the spring. The time of the melting depends upon the presence or absence of these chinook winds."

"I don't think water runs there regularly from freshets over two months in the year."

It manifestly appears from the testimony of witnesses for the plaintiffs that what plaintiffs denominate as "Spring Creek" or "a natural watercourse" is nothing more than a mere surface drainage occasioned by unusual freshets or other extraordinary causes, such as melting snow from chinook winds. Under the authorities cited, the water which flowed down this ravine was merely surface water, and as such, is regarded in law as a common enemy, and the defendant had the right to obstruct and hinder the flow of such water and to turn it back, if necessary, upon and across the lands of others, without liability for injury resulting from such obstruction.

As was forcefully stated by Judge Anders in the case of Cass v. Dicks, 14 Wash. 75, "Surface water caused by the falling of rain or the melting of snow, and that escaping from running streams and rivers, is regarded as an outlaw and a common enemy, against which anyone may defend himself, even though by so doing, injury may result to others." And "If one in the lawful exercise of his right to control, manage, or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so; and if damage thereby results to another, it is *damnum absque injuria.*"

It further appears from the evidence in these cases that floods of the character of that which occurred in January and February, 1916, were very infrequent. The engineer of the railway company testified that:

"The water flowage conditions in 1916 in Yakima Valley and throughout the eastern part of Washington in January, 1916, were far greater than any since 1906." It appears from the testimony that there was a flood in 1912-1914, but it does not appear that these floods were periodical or were to be expected every year. The testimony also conclusivly shows that the culvert or drain constructed by the defendant was sufficient to pass the usual amount of water resulting from melting snow, and it is submitted that it is not liable for damages to the propery of plaintiffs because this drain was insufficient to carry off the water of an extraordinary and unexpected flood.

It will be noted from the engineer's testimony that before this drain or culvert was placed in the embankment of the railway, he inquired of residents in the neighborhood as to weather conditions, and made an independent examination of the topography of the country. He acted upon the information thus obtained, and no doubt was informed that the waters which passed down this ravine were merely surface waters resulting from melting snow; and in the light of testimony of witnesses for plaintiffs, he must have been informed that the alleged Spring Creek contained no water eleven months in the year, and in some years was entirely dry. Under this state of facts, it is submitted that the railroad company was not guilty of any negligence in the construction of this embankment or culvert.

It conclusively appears that the only flow of water which passed down the so-called "Spring Creek," was caused by snow melting upon and running down from

the surface of the hills northwest of defendant's railway into a ravine or hollow.

The statutes of the State of Washington expressly provide that the common law, so far as it is not inconsistent with the Constitution and Laws of the United States or of the State of Washington, nor incompatible with the institutions and conditions of society of that state, shall be the rule of decision in all of its courts. There is no constitutional or statutory provision in the State of Washington governing or controlling the subject in the instant case. It therefore follows that the rights of the parties to these actions should be determined according to the rule of the common law, and under that rule surface water is regarded as a common enemy, and every owner of land has the right to take any measures necessary for the protection of his own property against surface waters, although in doing so, he may throw the same upon other landed proprietors to their damage. Such damage the law regards as *damnum absque injuria* and affording no cause of action.

As before argued by us, the complaints in these actions were drawn distinctly upon the theory that the injury sustained by the plaintiffs was the result of an overflow of surface waters. It is true that allegations are made in the complaints that "Spring Creek" is a "natural watercourse," but that allegation is qualified by the allegation that the large volume of water therein was due to the melting of the snow. The trial court, however, instructed the jury as a matter of law that Spring Creek was a natural watercourse. Our contention is that the court should have instructed the jury as

a matter of law that the waters which flowed down this ravine, which plaintiffs call "Spring Creek," were nothing more than mere surface waters, resulting from melting snow which fell upon the hills in an unusual quantity. If the injury to the property of plaintiffs was occasioned by flooding from surface waters, and not by the diversion by the defendant of a natural watercourse, then it follows, under authorities, that there could be no recovery, and any damage suffered would be *damnum absque injuria.*

In any event, if there was any doubt as to whether or not the injury was occasioned by surface waters, then this question should have been submitted to the jury under proper instructions, explaining the difference between surface water and a natural watercourse. This was not done.

For the reasons assigned, the judgment of the lower court should be reversed and set aside, and it should be directed by this court to enter a judgment in favor of the defendant and against each of the plaintiffs, dismissing said actions, and awarding defendant judgment for its costs herein.

Respectfully submitted,

A. C. Spencer and
C. E. Cochran,

Attorneys for Plaintiff in Error.

James E. Fenton,
Of Counsel.